Dec 11 1876
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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~130.~~ 23

CORNELIUS STORM, A. SHRADER, GEORGE D. NAGLE, AND C. C. WILSON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED DECEMBER 26, 1873.

Dec 16 1876
Affirmed
per Clifford

SUPREME COURT OF THE UNITED STATES

No. 130.

CORNELIUS STORM, A. SHRADER, GEORGE D. NAGLE, AND C. C. WILSON, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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1 *Summons.*

UNITED STATES OF AMERICA:

In the circuit court of the United States, of the ninth circuit, in and for the district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CORNELIUS STORM & AL., DEFENDANTS.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court in the city of San Francisco.

The President of the United States of America, greeting: To Cornelius Storm, A. J. Shrader, George D. Nagle, and C. C. Wilson, defendants:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein, in the office of the clerk of said court in the city and county of San Francisco, within ten days after the service on you of this summons, if served in this county; or, if served out of this county, then within forty days; or judgment by default will be taken against you. The said action is brought to recover the sum of $2,891 $\frac{67}{100}$ in gold coin of the United States, being part penalty of a certain bond executed by you and delivered to the plaintiff on the 5th day of May, 1870, conditioned

2 for the faithful performance by the said Cornelius Storm and A. J. Shrader of certain articles of agreement therein set forth, the conditions of which bond plaintiff alleges to have been broken, together with costs of suit, as will more fully appear by reference to the complaint on file herein; and if you fail to appear and plead, answer, or demur, as herein required, judgment by default will be entered against you and each of you.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States of America, this 21st day of October, in the year of our Lord one thousand eight hundred and seventy-one, and of our Independence the ninety-sixth.

SEAL OF U. S. CIRCUIT COURT, DIST. OF CAL.

LORENZO S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *D. C.*

(Endorsed:)

OFFICE OF U. S. MARSHAL,
DISTRICT OF CALIFORNIA.

I hereby certify that I served copies of the within summons personally upon Cornelius Storm and A. J. Shrader, on the 21st, and G. D. Nagle on the 23d, day of October, A. D. 1871, all in the city and county of San Francisco, and that I have not served C. C. Wilson for the reason that I could not find him.

WM. GOUVERNEUR MORRIS,
U. S. Marshal,
By B. J. AKERMAN, *Deputy*.

Filed on return this 25th day of October, 1871.

L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *D. C.*

3 *Complaint.*

United States circuit court, ninth circuit, district of California.

THE UNITED STATES OF AMERICA
vs.
CORNELIUS STORM, A. J. SHRADER, George D. Nagle and C. C. Wilson.

DISTRICT OF CALIFORNIA, *ss:*

The United States of America, by L. D. Latimer, esq., their attorney, complains of Cornelius Storm, A. J. Shrader, George D. Nagle, and C. C. Wilson, defendants, of a plea that they render unto said plaintiff the sum of two thousand eight hundred and ninety-one dollars and sixty-seven cents, gold coin of the United States, which they owe and unjustly detain. For that whereas the said defendants heretofore, to wit, on the fifth day of May, in the year of our Lord one thousand eight hundred and seventy, at the city and county of San Francisco, in the district aforesaid, by their certain writing obligatory, sealed with their seals, and delivered, and now shown to the court, the date whereof is the day and year above named, acknowledged themselves to be held and firmly bound unto the said plaintiff in the sum of twelve thousand dollars, to be paid to the said plaintiff. And the said plaintiff says that the

4 said writing obligatory was made with a condition thereunder written that if the above-named defendants, Cornelius Storm and A. J. Shrader, their heirs, executors, and administrators, or any of them, should and did in all things well and truly observe, perform, fulfill, accomplish, and keep all and singular the covenants, conditions, and agreements whatsoever, which on the part of the said Cornelius Storm and A. J. Shrader, their heirs, executors, or administrators, were, or ought to be observed, performed, fulfilled, accomplished and kept, which were comprised or mentioned in certain articles of agreement bearing date the fifth day of May, one thousand eight hundred and seventy, between Captain William B. Hughes, assistant quartermaster United States Army, and the said Cornelius Storm and A. J. Shrader, concerning the delivery of supplies of barley, oats, hay, and straw, (which said agreement was made and entered into by the said Hughes for the benefit of the said plaintiffs,) according to the true intent and meaning of said articles of agreement, then the said obligation was to be void; otherwise, to remain in full force and virtue.

And the plaintiff further says that the said articles of agreement in the condition of the said writing obligatory mentioned (and which was duly executed and delivered by the parties thereto on the day of its date) was and is in the words and figures and of the tenor following, that is to say:

"This agreement, made at San Francisco, California, this fifth day of May, A. D. one thousand eight hundred and seventy, between Capt. Wm. B. Hughes, assistant quartermaster U. S. Army, of the one part, and C. Storm and A. J. Shrader, (firm of Storm & Co.,) of San

5 Francisco, State of California, of the other part, witnesseth: That the said Capt. Wm. B. Hughes, assistant quartermaster U. S. Army, for and on behalf of the United States of America, and the said Storm & Co., for themselves, their heirs, executors, administrators, and assigns, have mutually agreed and by these presents do mutually covenant and agree to and with each other, in manner following, viz:

"First. That the said Storm & Co. shall at all the places hereinafter mentioned, between the first day of July, one thousand eight hundred and seventy, and the thirtieth day of June, one thousand eight hun-

dred and seventy-one, deliver, in such quantities, more or less, and in such monthly proportions as determined by the said Captain Wm. B. Hughes, assistant quartermaster U. S. Army, or his successor, the following forage and straw, to be of the best quality in this market, clean and fit for immediate use: One million (1,000,000) pounds barley in sacks, one million (1,000,000) pounds oats in sacks, two million (2,000,000) pounds oat-hay, five hundred thousand (500,000) pounds straw.

"Second. The above said amounts, more or less, of forage and straw, of the best quality in this market, and in such monthly proportions as may be determined by the said Capt. Wm. B. Hughes, assistant quartermaster U. S. Army, or his successor, shall be delivered between July 1st, one thousand eight hundred and seventy, and June 30th, one thousand eight hundred and seventy-one, in the city of San Francisco, California, and at each of the military posts that are now or may be established during the year, in and about the harbor of San Francisco,
6 viz, Alcatraz Island, Angel Island, Yerba Buena Island, Presidio of San Francisco, Point San José, and Port Point, and at such points as may be designated by the acting assistant quartermaster at each post; that portion of the aforesaid supplies deliverable in the city of San Francisco shall be delivered at such place or places as shall be designated by the said Capt. Wm. B. Hughes, assistant quartermaster U. S. Army, or his successor. All the supplies to be subject to inspection at the places of delivery.

"Third. The said Storm & Co. shall receive for the supplies delivered at the places aforesaid, and accepted under this contract, the following prices, in United States gold coin, or equivalent in legal-tender notes, on day of payment, viz, for each one thousand pounds barley, ten dollars and sixty-five cents, ($10.65;) for each one thousand pounds oats, twelve dollars and sixty-five cents, ($12.65;) for each one thousand pounds hay, five dollars and ninety cents, ($5.90; for each one thousand pounds straw, four dollars and thirty-five cents, ($4.35;) payment to be made in San Francisco, California, at the end of each month, for such of the above supplies delivered and accepted in such month, should the Quartermaster's Department be in funds; if not, then as soon as funds may be received.

"Fourth. That whenever and as often as the forage and straw specified to be delivered under this contract, or any part thereof, shall, in the opinion of the commanding officer at the place of delivery, be unfit for issue, or of a quality inferior to that called for by this contract, a survey shall be held by one or more officers, to be designated by the commanding officer, which board of survey shall have power to reject the whole, or such portions of the said forage and straw as ap-
7 pear unfit for issue, or of a quality inferior to that contracted for.

"Fifth. That in case of failure or deficiency in the quantity or quality of the forage and straw herein contracted to be delivered, then the said Capt. Wm. B. Hughes, assistant quartermaster U. S. Army, or his successor, shall have the power to supply the deficiency by purchase in open market, and the said Storm & Co. shall be required to pay the difference in cost, if any, in gold coin of the United States, or its equivalent in legal-tender notes.

"Sixth. No member of Congress, officer or agent of the Government, or persons employed in the public service shall be admitted to any interest, share, or part in, or to any benefit to arise from, this contract.

"Seventh. It is provided that this contract may be terminated a such time as the Quartermaster-General may direct, and it is made subject to the approval of the department and division commanders.

"In witness whereof the undersigned have hereunto placed their hands and seals the day and year first above written.

"WM. B. HUGHES, [SEAL.]
"*Capt. and Asst. Quartermaster U. S. A.*
"CORN'S STORM. [SEAL.]
"A. J. SHRADER. [SEAL.]

"Witnesses:
"WILLIAM MOODY.
"GEO. C. WALLER."

By which said articles of agreement, the same having been duly approved by the division and department commanders, the said Cornelius Storm and A. J. Shrader covenanted and agreed, by and with the said Hughes, acting for and on behalf of the said plaintiff, to deliver
8 the said articles of goods and chattels at the times, and in the manner, and at the prices in said articles of agreement mentioned, for the use and benefit of the said plaintiff.

And the plaintiff avers that the said Hughes did faithfully perform and keep each and every the covenants and stipulations in said articles of agreement to be performed and kept on his part, but that the said Cornelius Storm and A. J. Shrader, or either of them, did not observe, perform, accomplish, or keep the covenants, conditions, or agreements mentioned in the said articles of agreement. And the said plaintiff, for assigning a breach in the said condition of the said articles of agreement, says that the said defendants, Cornelius Storm and A. J. Shrader, in the month of January, 1871, neglected and refused to deliver the amount of sixty-nine thousand and eight pounds of oats, seventy-seven thousand five hundred and eighteen pounds of hay, and twenty-five thousand seven hundred and eighty-nine pounds of straw, although the same was duly demanded of them under the said articles of agreement and according to the terms thereof, the same being then and there the quantities and proportions of said oats, hay, and straw for the said month of January, 1871, as determined by the said Capt. William B. Hughes, assistant quartermaster United States Army, the same being required for the use of the United States, and, in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said United States, in open market, and at a much greater price than that named in said articles of agreement, the said amount of sixty-nine thousand and eight pounds of oats at the rate of seventeen dollars and fifty cents, gold coin of the United States, for each
9 thousand pounds of said oats, and the said amount of seventy-seven thousand five hundred and eighteen pounds of hay at the rate of nine dollars and eighty-two cents, gold coin of the United States, for each one thousand pounds of said hay, and the said amount of twenty-five thousand seven hundred and eighty-nine pounds of straw at the rate of six dollars and fifty cents, gold coin of the United States, for each one thousand pounds of said straw; whereby plaintiff was injured and sustained damages in the amount of six hundred and ninety-four dollars and eleven cents, gold coin of the United States, being part of the amount above demanded.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says that the said defendants, Cornelius Storm and A. J. Shrader, in the month of February, 1871, neglected and refused to deliver the further amount of forty-three thousand nine hundred and forty-four pounds of oats, two hundred and seventy-nine pounds of barley, sixty thousand and ninety-six pounds of hay,

and thirty thousand eight hundred and sixty-six pounds of straw, although the same was duly demanded of them under the said articles of agreement and according to the terms thereof, the same being then and there the quantities and proportions of said oats, barley, hay, and straw for the said month of February, 1871, as determined by the said Captain William B. Hughes, assistant quartermaster United States Army, the same being required for the use of the United States; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said United States, in
10 open market, and at a much greater price than that named in said articles of agreement, the said amount of forty-three thousand nine hundred and forty-four pounds of oats at the rate of eighteen dollars, gold coin of the United States, for each one thousand pounds of said oats, and the said amount of two hundred and seventy-nine pounds of barley at the rate of sixteen dollars and twenty-five cents, gold coin of the United States, for each one thousand pounds of said barley, and the said amount of sixty thousand and ninety-six pounds of hay at the rate of nine dollars and fifty cents, gold coin of the United States, for each one thousand pounds of said hay, and the said amount of thirty thousand eight hundred and sixty-six pounds of straw at the rate of six dollars and fifty cents, gold coin of the United States, for each one thousand pounds of said straw; whereby plaintiff was injured and sustained damages in the amount of five hundred and nineteen dollars and thirty-four cents, gold coin of the United States, being part of the amount above demanded.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says that the said defendants, Cornelius Storm and A. J. Shrader, in the month of March, 1871, neglected and refused to deliver the further amount of forty-six thousand six hundred and eighty-eight pounds of oats, five hundred and fifty-eight pounds of barley, sixty-five thousand two hundred and ninety-eight pounds of hay, and twenty-four thousand and eight hundred pounds of straw, although the same was duly demanded of them under the said articles of agreement, and according to the terms thereof, the same being then and there the
11 quantities and proportions of said oats, barley, hay, and straw for the said month of March, 1871, as determined by the said Capt. William B. Hughes, assistant quartermaster United States Army, the same being required for the use of the United States; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said United States, in open market, and at a much greater price than that named in said articles of agreement, the said amount of forty-six thousand six hundred and eighty-eight pounds of oats, at the rate of eighteen dollars gold coin of the United States for each one thousand pounds of said oats, and the said amount of five hundred and fifty-eight pounds of barley, at the rate of fifteen dollars gold coin of the United States for each one thousand pounds of said barley, and the said amount of sixty-five thousand two hundred and ninety-eight pounds of hay, at the rate of nine dollars and fifty cents gold coin of the United States for each one thousand pounds of said hay, and the said amount of twenty-four thousand and eight hundred pounds of straw, at the rate of six dollars and fifty cents gold coin of the United States for each one thousand pounds of said straw:

Whereby plaintiff was injured and sustained damages in the amount of five hundred and thirty-five dollars and sixty-eight cents gold coin of the United States, being part of the amount above demanded.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says that the said defendants, Cornelius Storm and A. J. Shrader, in the month of April, 1871, neglected and
12 refused to deliver the further amount of fifty thousand six hundred and twenty-four pounds of oats, four thousand five hundred and fifty-eight pounds of barley, sixty-nine thousand two hundred and thirty-eight pounds of hay, and twenty-one thousand and eight hundred pounds of straw, although the same was duly demanded of them under the said articles of agreement and according to the terms thereof, the same being then and there the quantities and proportions of said oats, barley, hay, and straw for the said month of April, 1871, as determined by Capt. G. C. Smith, assistant quartermaster United States Army, successor of the said Capt. William B. Hughes, the same being required for the use of the United States; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase and did purchase, for the use of said United States, in open market, and at a much greater price than that named in said articles of agreement, the said amount of fifty thousand six hundred and twenty-four pounds of oats, at the rate of sixteen dollars and twenty-five cents gold coin of the United States for each one thousand pounds of said oats, and the said amount of four thousand five hundred and fifty-eight pounds of barley, at the rate of fourteen dollars and forty cents gold coin of the United States for each one thousand pounds of said barley, and the said amount of sixty-nine thousand two hundred and thirty-eight pounds of hay, at the rate of seven dollars and ninety-two and one-half cents gold coin of the United States for each one thousand pounds of said hay, and the said amount of twenty-one thousand and eight hundred
13 pounds of straw, at the rate of five dollars and ninety-two and one-half cents gold coin of the United States for each one thousand pounds of said straw:

Whereby plaintiff was injured and sustained damages in the amount of three hundred and seventy-three dollars and eighty-five cents gold coin of the United States, being part of the amount above demanded.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says that the said defendants, Cornelius Storm and A. J. Shrader, in the month of May, 1871, neglected and refused to deliver the further amount of forty-eight thousand and ninety-eight pounds of oats, three thousand two hundred and thirty-three pounds of barley, sixty-four thousand two hundred and ninety-four pounds of hay, and twenty-five thousand eight hundred and fifty pounds of straw, although the same was duly demanded of them under the said articles of agreement and according to the terms thereof, the same being then and there the quantities and proportions of said oats, barley, hay, and straw for the said month of May, 1871, as determined by the said Capt. G. C. Smith, assistant quartermaster United States Army, successor of the said Capt. William B. Hughes, the same being required for the use of the United States; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase and did purchase, for the use of said United States, in open market, and at a much greater price than that named in said articles of agreement, the said amount of forty-eight
14 thousand and ninety-eight pound of oats, at the rate of sixteen dollars and twenty-five cents gold coin of the United States for each one thousand pounds of said oats, and the said amount of three thousand two hundred and thirty-three pounds of barley, at the rate of fourteen dollars and forty cents gold coin of the United States for each one

thousand pounds of said barley, and the said amount of sixty-four thousand two hundred and ninety-four pounds of hay, at the rate of seven dollars and ninety-two and one-half cents gold coin of the United States for each one thousand pounds of said hay, and the said amount of twenty-five thousand eight hundred and fifty pounds of straw, at the rate of five dollars and ninety-two and one-half cents gold coin of the United States for each one thousand pounds of said straw:

Whereby plaintiff was injured and sustained damages in the amount of three hundred and fifty-five dollars and sixty-four cents gold coin of the United States, being part of the amount above demanded.

And for a further breach of the condition of the said articles of agreement, the said plaintiff says that the said defendants, Cornelius Storm and A. J. Shrader, in the month of June, 1871, neglected and refused to deliver the further amount of thirty-four thousand seven hundred and sixty pounds of oats, six thousand six hundred and twenty pounds of barley, fifty-four thousand two hundred and forty pounds of hay, and sixteen thousand and five hundred pounds of straw, although the same was duly demanded of them under the said articles of agreement and according to the terms thereof, the same
15 being then and there the quantities and proportions of said oats, barley, hay, and straw for the said month of June, 1871, as determined by the said Capt. G. C. Smith, assistant quartermaster United States Army, successor of the said Capt. William B. Hughes, the same being required for the use of the United States; and in consequence of such neglect and refusal, and for the purpose of supplying the deficiency caused thereby, the said plaintiff was obliged to purchase, and did purchase, for the use of said United States, in open market, and at a much greater price than that named in said articles of agreement, the said amount of thirty-four thousand seven hundred and sixty pounds of oats at the rate of sixteen dollars and seventy-five cents, gold coin of the United States, for each one thousand pounds of said oats, and the said amount of six thousand six hundred and twenty pounds of barley at the rate of fourteen dollars and forty cents, gold coin of the United States, for each one thousand pounds of said barley, and the said amount of fifty-four thousand two hundred and forty pounds of hay at the rate of seven dollars and ninety-two and one-half cents, gold coin of the United States, for each one thousand pounds of said hay, and the said amount of sixteen thousand and five hundred pounds of straw at the rate of five dollars and ninety-two and one-half cents, gold coin of the United States, for each one thousand pounds of said straw; whereby plaintiff was injured and sustained damages in the amount of two hundred and eighty-five dollars and sixty-eight cents, gold coin of the United States, being part of the amount above demanded.

And the plaintiff further says that, by reason of the failure of
16 defendants to comply with and perform the conditions of said articles of agreement as aforesaid, plaintiff was obliged to pay, and did pay, for the transportation of a part of the said oats, barley, hay, and straw, from the place where the same were purchased to the place where the same were required, the sum of one hundred and twenty-seven dollars and thirty-seven cents, in gold coin of the United States; whereby the said plaintiff was injured and sustained further damages in the further amount of one hundred and twenty-seven dollars and thirty-seven cents, gold coin of the United States, being part of the amount above demanded:

Whereby an action hath accrued to the said plaintiff to demand and have of and from the said defendants the said sum of two thousand eight hundred and ninety-one dollars and sixty-seven cents above

demanded; yet the said defendants, although often requested, have not yet paid the said sum of two thousand eight hundred and ninety-one dollars and sixty-seven cents above demanded, or any part thereof, but to pay the same have neglected and refused, and still do neglect and refuse.

Wherefore plaintiff brings this action, and prays judgment against said defendants for the said sum of two thousand eight hundred and ninety-one dollars and sixty-seven cents, in gold coin of the United States, and costs.

October 20th, 1871.

L. D. LATIMER,
U. S. Attorney.

(Endorsed:) Filed Oct. 20th, 1871. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

17 *Answer.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
v.
CORNELIUS STORM, A. J. SHRADER, GEORGE D. Nagle, and C. C. Wilson, defendants.

DISTRICT OF CALIFORNIA, *ss:*

Now come the defendants in the above-entitled action, and, for answer to the complaint therein, deny each and every and all and singular the allegations thereof.

And said defendants, for a further and separate defence to said action, allege that on the 31st day of December, A. D. 1870, there was due and owing, under said agreement set forth in said complaint, to the defendants, Storm and Shrader, for supplies furnished by them and accepted by the commanding officers at the respective places of delivery, under and by virtue of said contract, during the said month of December, A. D. 1870, the sum of one thousand four hundred seventy-six and $\frac{43}{100}$ dollars ($\$1,476\frac{43}{100}$); that during said month the said Storm and Shrader had delivered such quantities and proportions as was required and determined by said Hughes, and of the best quality in this market, and

18 had faithfully performed all the conditions and covenants of said agreement on their part to be performed; that the Quartermaster's Department mentioned in said agreement was, during the whole of the time from the 1st day of December, A. D. 1870, to the 31st day of January, A. D. 1871, in funds within the meaning of said agreement, and had, during the whole of said period of time, more funds on hand than was required to pay and discharge in full the said amount due and owing to said defendants, Storm and Shrader, under said agreement, for supplies furnished and delivered by them as aforesaid in said month of December, 1870; yet the said Hughes and said Quartermaster's Department utterly, wrongfully, and absolutely refused to pay said Storm and Shrader, or either of them, said sum of $\$1,476\frac{43}{100}$, or any part thereof, at the end of said month of December, A. D. 1870, and also refused to pay the same, or any part thereof, on the 3rd day of January, A. D. 1871, although payment was duly demanded of said Hughes and of said Quartermaster's Department on the said 31st of December, 1870, and on the said 3d day of January, A. D. 1871, in San Francisco, California, whereby and whereupon, and by reason of the said breach of said agreement first made by said Hughes and said plaintiff, the said defendants, Storm and Shrader, elected to treat the said agreement as rescinded and abandoned, and thereupon, on or about the 3d day of January, A. D. 1871, duly and personally notified the said Hughes of such rescission

and abandonment, and also of their intention not to furnish any more supplies under said agreement.

19 Wherefore defendants pray that the plaintiff take nothing by this action, and that defendants be hence dismissed with their costs.

EUGENE B. DRAKE,
Attorney for Defts.

NOVEMBER 20th, 1871.

I hereby certify that the foregoing answer in the above-entitled action is, in my opinion, well founded in point of law.

EUGENE B. DRAKE,
Atty. for Defts.

NOVEMBER 20th, 1871.

(Endorsed:)

Service of copy of within answer on me admitted this 20th Nov., 1871.
L. D. LATIMER, *U. S. Atty.*,
Per JEWETT.

Filed 20th Nov., 1871. L. S. B. Sawyer, clerk.

20 *Verdict.*

In the United States circuit court, district of California.

THE UNITED STATES
v.
CORNELIUS STORM & AL. } Verdict.

We, the jury, find for the plaintiff in the sum of $2,615\frac{40}{100}$ in U. S. currency.

JACOB DEETH,
Foreman.

(Endorsed:) Filed 9th November, 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

21 *Judgment.*

In the circuit court of the United States of the ninth judicial circuit, in and for the district of California.

UNITED STATES
vs.
CORNELIUS STORM. } No. 989.

This cause having come on regularly for trial on the 7th day of November, A. D. 1872, being a day in the October term, A. D. 1872, of said court, before the court and a jury of twelve men duly impaneled, L. D. Latimer, U. S. attorney, appearing on behalf of the United States, and Eugene B. Drake, esquire, on behalf of defendants, and the trial having been proceeded with upon the 8th and 9th days of said November, and witnesses on behalf of the plaintiff and of the defendants having been sworn and examined, and the evidence being closed, the cause, after arguments of counsel and the instructions of the court, having been submitted to the jury, and the jury having subsequently rendered the following verdict, "We, the jury, find for the plaintiff in the sum of $\$2,615\frac{40}{100}$, in U. S. currency," and the court having ordered that judgment be entered herein in accordance with said verdict:

Now, therefore, by virtue of the law, and by reason of the premises aforesaid, it is considered by the court that the United States, plaintiff,

22 do have and recover of and from Cornelius Storm, A. J. Shrader, George D. Nagle, and C. C. Wilson, defendants, the sum of two

thousand six hundred and fifteen $\frac{40}{100}$ dollars, and its costs in this behalf expended, taxed at three hundred and ninety-four $\frac{10}{100}$ dollars.

Judgment entered the 9th day of November, A. D. 1872.

L. S. B. SAWYER,
Clerk.

A true copy of an original entered in the therein-entitled cause in judgment register, C., L. No. 1,558 and 9.

Attest., &c:

[SEAL.] L. S. B. SAWYER,
Clerk.

(Endorsed:) Filed 9th November, A. D. 1872. L. S. B. Sawyer, clerk.

23 *Certificate to judgment roll.*

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit in and for the district of California, do hereby certify that the foregoing papers attached together constitute the judgment roll in the cause therein entitled.

Attest my hand and the seal of said circuit court this 22d day of November, A. D. 1872.

[L. S.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Deputy Clerk*.

(Endorsed:) Judgment roll. Filed 22d Nov., 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

24 *Bond on writ of error.*

In the Supreme Court of the United States of America.

DISTRICT OF CALIFORNIA,
City and County of San Francisco, ss:

Know all men by these presents, that we Cornelius Storm, A. J. Shrader, George D. Nagle, and C. C. Wilson as principals, and Andrew Himmelman and John Higgons, of the city and county of San Francisco, in the district and State of California, are held and firmly bound unto the United States of America in the just and full sum of five thousand dollars to be paid to the said United States of America.

To which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals. Dated the nineteenth day of November, A. D. 1872.

Whereas the above-named Cornelius Storm, A. J. Shrader, George D. Nagle, and C. C. Wilson have prosecuted a writ of error to the Supreme Court of the United States of America to reverse the judgment heretofore entered in the circuit court of the United States for the district of California, in a cause wherein the said United States were plaintiffs and said Cornelius Storm, A. J. Shrader, and George D. Nagle were defendants:

Now, therefore, the condition of this obligation is such, that if the above-named Cornelius Storm, A. J. Shrader, George D. Nagle, and C. C. Wilson shall prosecute their said writ of error to effect and
25 answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise it shall remain in full force and virtue.

A. J. SHRADER. [SEAL.]
C. C. WILSON. [SEAL.]
A. HIMMELMANN. [SEAL.]
JOHN HIGGINS. [SEAL.]

Sealed and delivered and acknowledged before me this 19 day of November, A. D. 1872.

L. S. B. SAWYER.

UNITED STATES OF AMERICA,
District of California, ss :

Andrew Himmelmann and John Higgins, being severally duly sworn, each for himself deposes and says that he is a householder in said district and is worth the sum of five thousand dollars, exclusive of property exempt from execution, and over and above his just debts and liabilities.

A. HIMMELMANN.
JOHN HIGGINS.

Sworn to and subscribed before me this 19 November, A. D. 1872.

L. S. B. SAWYER,
U. S. Commr., &c.

I approve the form of the foregoing bond and the sufficiency of the sureties thereon.

(Sgd.) LORENZO SAWYER,
Circuit Judge.

(Endorsed :) Filed 19 November, 1872. L. S. B. Sawyer, clerk.

26 *Bill of exceptions.*

In the circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CORNELIUS STORM & AL., DEFENDANTS. } Bill of exceptions.

Be it remembered, that upon the trial of the above entitled cause in the above-named court, before the honorable Lorenzo Sawyer, judge of said court, sitting with a jury, duly impaneled, accepted, and sworn to try the issues raised by the pleadings, it became necessary for the plaintiff, to sustain the issues on its part, to offer in evidence the contract sued upon and set forth at large and in full in the complaint in said cause. And defendants thereupon objected to the introduction of said contract in evidence upon the grounds and for the reasons, that it is a nudum pactum, in this, that it appears upon its face and by its express terms, that it (said contract) could have been terminated and ended at any time the Quartermaster-General (or the plaintiff) might have directed, without the consent of the defendants, or any or either of them; and defendants contended that as said contract was not mutually binding upon all the contracting parties thereto, that it was
27 therefore, for want of mutuality and consideration, inoperative and void, and was, therefore, not binding upon the defendants or upon any or either of them for any purpose whatever, and was immaterial, irrelavent, and inadmissable in evidence against the defendants. The objections of the defendants were overruled by the court and the contract read in evidence before the court and jury; to which ruling and decision of the court the defendants then and there duly excepted.

And it also became necessary for the plaintiff, in order to sustain the issues on its part, to prove the quantity and value of forage and grain bought in open market by the plaintiff in the months of January, February, and March, 1871, by reason of the failure of the defendants Storm and Shrader to furnish the quantity and quality agreed to be furnished by them under said contract, in order to show the difference in the price contracted to be paid by plaintiffs under said contract, and the price paid by the plaintiff in open market, (in excess of said contract

price,) under the 5th stipulation of said contract, and the consequent loss thereby to the plaintiffs as alleged in their said complaint, and for that purpose the plaintiffs called as a witness, among others in its behalf, R. H. Bennett, who was sworn and testified as follows: "In January, 1871, I furnished forage and grain on *on* the requisition of Capt. Hughes, assistant quartermaster U. S. Army, in the city of San Francisco, in the following proportions, to wit, 69,008 lbs. oats, 77,518 lbs. hay, and 25,789 lbs. straw. I also furnished in the same manner for February, 1871, 439,44 lbs. oats, 279 lbs. barley, 5,824 lbs. hay, and 1,400 lbs. straw; also in March, 1871, 45,944 lbs. oats, 558 lbs. barley, 2,604 lbs. hay, and 600 lbs. straw. The prices charged by me for the forage and grain so furnished during those months were as follows:

28	In January, 1871.	Oats	$1.75 per 100 lbs.
		Hay	$19.00 " ton.
		Straw	$13.00 " "
	In February 1871.	Oats	$1.80 " 100 lbs.
		Barley	$1.62½ " " "
		Hay	$19.00 " ton.
		Straw	$13.00 " "
	In March, 1871.	Oats	$1.80 " 100 lbs.
		Barley	$1.50 " " "
		Hay	$19.00 " ton.
		Straw	$13.00 " "

I think the above were regular market-prices in gold coin; in fact a little less than I charged to other persons. During the time stated I was, and for many years have been, engaged in and carrying on the business of a dealer in grain, hay, and other produce in the city of San Francisco.

On cross-examination this witness (Mr. Bennett) testified "That he did not at all times have the quantity called for on hand, and when he did not he went out and bought; that he was buying and selling every day as everybody does in that business; that sometimes Mr. Foy, a clerk in the quartermaster's office, brought the orders to him from the Department, and sometimes he got them at the quartermaster's office." "I usually filled the orders as soon as possible, on the same or the following day. I bought some hay and straw in January from Riders & Somers to fill these orders."

Defendants' counsel here asked this witness the following question:

"Who did you buy 69,008 lbs. of oats from, charged by you as
29 having been delivered to the Government in January, 1871?"

Plaintiff's attorney objected to the question on the ground that it was irrelavent.

The court sustained the objection of the plaintiff to said question and refused to allow the witness to answer it, whereupon the defendants then and there duly excepted to the said decision and ruling of the court.

Defendants' counsel then asked the following question: "Did you commute with any of the subordinate officers for any portion of the forage to which they were entitled, instead of delivering such portion of forage; and, if so, can you tell what quantity of forage, straw, and grain has been charged for on your books during those three months as having been actually purchased in open market, and delivered, which was not so purchased or delivered, but was commuted by you with the officers by paying them money instead of delivering the forage and grain?"

Answer. "I can by looking at my books."

Question by defendants' counsel. "Then please examine your books and state what amount of forage, straw, and grain was charged up by you during those three months that was not purchased in open market or delivered to the Government."

Plaintiff's attorney objected to the question as irrelevant and immaterial.

The court sustained the objection, and refused to allow the witness to answer the question; to which ruling and decision of the court the defendants then and there duly excepted.

It was proven by evidence, undisputed and uncontradicted, that during the first six months of the year 1871, the quarter-
30 master's requisitions for oats, barley, hay, and straw for the military posts named in the agreement aforesaid of the defendants with Hughes, quartermaster, was not in excess of the quantity prescribed by law and the Army regulations, nor in excess of the quantity actually called for in the requisitions and estimates of the several post-quartermasters, and that the United States paid for the quantity called for in such requisition and no more, and that such payments were made only after the receipt by the quartermaster of receipts and vouchers from the said several post-quartermasters, showing upon their face and to the satisfaction of the quartermaster that the requisitions had been filled, and these receipts and vouchers of the said post-quartermasters were the receipts upon which the quartermaster usually acted in the payment and settlement for supplies furnished under similar contracts in the ordinary and usual course of the business of his office.

The cause was afterwards submitted to the jury, who retired to deliberate upon their verdict, and afterwards came into court, and rendered a verdict in favor of the plaintiff and against the defendants for the sum of $2,615.40. And the said defendants, by their counsel, did then and there, within the time allowed by the rules and practice of this court, propose their aforesaid exceptions to the circuit judge of said circuit court and request him to allow this bill of exceptions, which is done, signed, and sealed at San Francisco, the 30th day January, A. D. 1873.

(S'g'd) LORENZO SAWYER, [SEAL.]
Circuit Judge of the United States Circuit Court, Ninth Circuit, District of California.

31 (Endorsed:) Filed Jany. 30th, 1873. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

32 UNITED STATES OF AMERICA,
District of California, ss:

I, Lorenzo S. B. Sawyer, clerk of the United States circuit court for the district of California, in the ninth judicial circuit, do hereby certify that the foregoing thirty written pages, numbered from one to thirty, both inclusive, are a full and true copy of the original record and of all the proceedings in the cause therein entitled, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court this 31st day of January, A. D. 1873.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By J. F. O'BEIRNE, *Dep. Clk.*

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of California, in the ninth judicial circuit, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, be-

tween the United States of America, defendants in error, and Cornelius Storm, A. J. Shrader, George D. Nagle, and C. C. Wilson are plaintiffs in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the first Monday of December next, in the said Supreme Court, to be there and then held, that, the record and proceedings aforesaid be' inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and seventy-one, and of the Independence of the United States the ninety-6th.

[SEAL.] L. S. B. SAWYER,
Clerk of U. S. Circuit Court Dist. of California,
By J. F. O'BEIRNE,
Deputy Clerk.

34 The answer of the judges of the circuit court of the United States for the district of California, ninth judicial circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE,
Deputy Clerk.

The answer of the judges of the circuit court of the United States for the district of California.

The record and proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By J. F. O'BEIRNE,
Deputy Clerk.

(Indorsed:) United States Supreme Court. Cornelius B. Storm & al., plffs. in error, vs. The United States of America, deft. in error. Writ of error. Filed Nov. 30th, 1872. L. S. B. Sawyer, clerk, by J. F. O'Beirne, dep. clk.

35 UNITED STATES OF AMERICA, *ss:*

To the United States of America, represented by Lorenzo D. Latimer, esquire, United States district attorney for the district of California, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States of America, to be held the city of Washington, in the District of Columbia, on the first Monday of January, A. D. 1873, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of California, in the ninth judicial circuit, wherein Cornelius Storm, A. J. Shrader, George D. Nagle, and C. C. Wilson are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief-Justice of the United States Supreme Court, this 30th day of November, A. D. 1872, and of the Independence of the United States the 97th.

[SEAL.] OGDEN HOFFMAN,
Judge of the District Court of the U. S. for the District of California.

(Indorsed:) United States Supreme Court. Cornelius Storm & al., plffs. in error, vs. The United States of America, deft. in error. Citation.

Service of a copy of the within citation this day admitted.
San Francisco, Nov. 30th, 1872.

L. D. LATIMER,
United States Dist. Atty. for the Dist. of Cal.

(Indorsement on cover:) No. 130. Cornelius Storm, A. Shrader, Geo. D. Nagle, and C. C. Wilson, plaintiffs in error, vs. The United States. California C. C. U. S. Filed 26th December, 1873.

U. S. Supreme Court.

No. 23.

CORNELIUS STORM et al.

vs.

THE UNITED STATES.

Brief for Plaintiffs in Error.

National Republican Printing House.

U. S. Supreme Court.

CORNELIUS STORM et als., Plaintiffs in Error,

vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFFS IN ERROR.

This suit was brought by the United States upon the bond of Cornelius Storm and A. J. Shrader, whereon George D. Nagle and C. C. Wilson were sureties; but the record does not show that this writing obligatory, viz: the bond, upon which the action was founded, was ever produced upon the trial, or that any copy thereof was ever filed in the case. It was an official bond, made with an officer of the United States and, necessarily, with the archives of the proper officer of the Government.

The record fails to disclose that any testimony was submitted to the jury, on the trial below, to show the existence or contents of such bond. The United States introduced certain articles of agreement, which were objected to, and very properly. This was not the obligation upon which suit was based, nor could it be so regarded. It was only a portion of the evidence in the case, and not the penal bond, which was the sole foundation of the action.

The mere recital of the substance of a paper of this character in the complaint, when the paper itself is in existence and easily accessible, is not sufficient. It was the foundation, the very gist, of the action, and should have been filed and proved. It was a proceeding in California, and the code

of that State provides for just such a case. (See volume 2 Civil Procedure of California, sec. 1855, p. 385, par. 3 and 4.)

Where the original is a record, or other public document, a copy of the original must be produced in the absence of the original itself.

2. It was error in the court to refuse this question, viz: "Who did you buy 69,008 lbs. of oats from, charged by you as having been delivered to the Government in January, 1871?" (Page 12 of the Record.) It was a proper, material, and relevant question for several reasons—

a. It might have tested the credibility of the witness.

b. If the name of the person had been revealed, defendants below were entitled to call such person, and might have shown by him that the price was not so great, or that it was not in excess of the market price, or that a less quantity was actually delivered.

c. It might have disclosed the fact that certain persons, who by the 6th clause of the agreement (p. 3 of the Record) were prohibited from having any interest therein, viz: No member of Congress, officer, or agent of the Government, or persons employed in the public service were interested; and, if so, then such person was in collusion with the quartermaster who made the agreement.

3. The court erred in refusing to allow the question put by counsel for defendants below, (p. 12 of Record,) which tended to show that certain of the grain was not purchased in *open market*. It was proper, material, and relevant.

According to the terms of the agreement between the quartermaster and Storm & Shrader, the former was *obliged* to purchase in *open market*, to supply any deficiency, and the difference between the open market price and the contract price was to be the *measure of damages*. Therefore, a question designed to show what the *market* price was, at the time complained of, should have been allowed. There was no

proof that any of the alleged purchases were made in *open market.*

This suit was brought to recover this very difference in prices, and it was clearly the right of defendants below to put such interrogatories as would show the prevailing *open market* prices at the date of the alleged purchases.

It was, as well, eminently proper and right that the defendants below should have the benefit of the books from whom such quartermaster purchased, because it was an essential, a vital element in the history of these transactions.

4. The question of counsel for defendants below, which proposed to show that certain grain called for by the contract, which the quartermaster alleges he purchased owing to defendant's failure to supply the same, was not actually purchased, but was, in point of fact, commuted for, was proper and relevant, and the court erred in refusing to allow it.

If the grain was not required by the Government, and if it was proper for certain officers to take their share of the forage in money, (which is expressly prohibited,) the value of commuted forage could not properly or legitimately be chargeable to or recovered from plaintiffs in error, for the Government has sustained no loss. But, if the Government did sustain any loss, the liabilities of plaintiffs in error is to be measured only by the difference in the price of the amount *actually* purchased in the *open market* and the contract price, and not by any commuted forage that officers may not have required, and which was never purchased. The record does not show that the alleged deficiencies were made up by *purchase* in *open market* in accordance with the terms of the agreement.

The judgment of the court below should be reversed.

QUINTON CORWINE,
Counsel for Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

CORNELIUS STORM ET ALII, PLAINTIFFS IN ERROR, *vs.* THE UNITED STATES. } No. 130.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

CORNELIUS STORM ET ALII, PLAINTIFFS IN ERROR, *vs.* THE UNITED STATES. } No. 130.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief for the United States.

The first exception is to the admission in evidence of the agreement executed by the plaintiffs (Record, pp. 2–4) upon the ground that it is *nudum pactum*, void and inadmissible for want of mutuality and of consideration; because, by its seventh item, (Record, p. 3, bottom,) it is terminable at the pleasure of the Quartermaster-General.

I.

This suit is upon a *bond*, conditioned for the performance of an agreement *under seal;* and it is common learning as declared by Lord Mansfield, in Pillans *v.* Van Mierop, 3 Burr., 1663; by Lord Kenyon, in Fallows *v.* Taylor, 7 T. R., 475; and by Best, C. J., in Morley *v.* Boothby, 3

Bing., 111; that even in a court of equity no consideration is necessary to sustain such instruments. (Page *v.* Trufant, 2 Mass., 159; Dorr *v.* Munsell, 13 Johns., 430; Center *v.* Billingshurst, 1 Cowen, 33; Guy *v.* McLean, 1 Dev., 46; Reynolds *v.* Rogers, 5 Ohio, 177.)

Therefore, while in Binnington *v.* Wallis, 4 B. & Ald., 650, a promise to a mistress was held void, in March. of Annandale *v.* Harris, 2 P. Wms., 433, a bond to her was declared good.

Nor is it every simple contract that is void because both parties have not equal rights of action. Chitty on Contr., (11th Am. ed.,) 20–21.

An entry upon its performance, and the reception of moneys under it, supply a consideration. (Kennaway *v.* Treleavan, 5 M. & W., 501; Newbury *v.* Armstrong, 6 Bing., 201; Morton *v.* Burn, 7 Ad. & El., 19; L'Amoreux *v.* Gould, 3 Seld., 349; Phelps *v.* Townsend, 8 Pick., 392; Fishmongers' Co. *v.* Robertson, 5 Man. & Gr., 131; Paige *v.* Parker, 8 Gray, 211.)

II.

The question to Bennett, (Record, p. 12,) of whom *he* bought forage, was irrelevant, immaterial, and properly excluded. So long as he sold to the United States at or below market rates, it could be of no consequence when, where, of whom, or for how much he obtained the supply; or whether he had bought it so long anterior to its sale to the Government as to make a gain or loss upon it, or purchased it as called for. The course of cross-examination, as to matters not directly in issue, is within the discretion of the court. (Sturgis *v.* Robbins,

62 Maine, 292; Mahew *v.* Thayer, 8 Gray, 172; Prescott *v.* Ward, 10 Allen, 209; Smith *v.* Dreer, 3 Wharton, 155; Rea *v.* Missouri, 17 Wallace, 532.)

He was not asked, upon direct examination, anything as to his own purchases, prices paid, &c.; nor would these (except incidentally) have tended to establish the market price, which was susceptible of direct proof; therefore this line of cross-examination was improper. (Philadelphia and Trenton Railroad Company *v.* Stimpson, 14 Peters, 461; Houghton *v.* Jones, 1 Wallace, 706.)

III.

The question as to commutation (Record, p. 12) was properly excluded. There was no evidence that any of those quantities stated in the direct examination of the witness were commuted for.

But it did appear (Record, p. 13) that the supplies were furnished upon the lawful and usual requisitions, and paid for upon sufficient vouchers; and that the course pursued was the customary one, with reference to which the plaintiffs in error must have contracted.

EDWIN B. SMITH,
Assistant Attorney-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

CORNELIUS STORM ET AL.
v.
THE UNITED STATES. } No. 23.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

Brief in reply for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

CORNELIUS STORM ET AL.
v.
THE UNITED STATES. } No. 23.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF IN REPLY FOR THE UNITED STATES.

The entire disregard by the plaintiffs' counsel of the fourth section of Rule 21 of this court as to a statement of facts and assignment of errors, &c., is of less consequence, now that the cause is submitted upon briefs, than it would have been had there been an oral argument. Still, it would have facilitated the labors of the court to have observed its rules.

As the brief for the United States was filed at the October term, 1875, the Assistant Attorney-General will avail himself of the permission given him to file another in reply to that just submitted by the counsel for the plaintiffs in error, and will very briefly touch upon the suggestions made in it, *seriatim*.

I.

Counsel, upon the first page of his brief, and in the objection there made, seems not properly to appreciate the functions and proper composition of a bill of exceptions. It does not profess, and ought not, to bring up all the proceedings and testimony in the case; but only so much of the evidence as is necessary to a fair understanding of the specific objections made to the rulings or refusals to rule of the court. For example, in an early case in New York, the chancellor said: "In the case of Van Gorden *v.* Jackson, 5 Johns., 467, I said that a bill of exceptions was given by statute, not to draw the whole matter into examination, but only on the points to which it was taken, and that the party excepting must lay his finger on those points which might arise either in *admitting or denying evidence* or matter of law, arising from *a fact not denied*, in which either party was overruled by the court." (Frier *v.* Jackson, 8 Johns., 507.) The words italicized above are so distinguished in the report, (8 Johns., 507,) and in that from which they are there quoted, (5 Johns., 467.) However numerous the errors committed during the trial, only those excepted to can be considered. It is not enough to show *an* error; it must be *the* error complained of in the bill of exceptions. (Jackson *v.* Cadwell, 1 Cowen, 622; Whiteside *v.* Jackson, 1 Wend., 418; Colgin *v.* Henley, 6 Leigh, (Va.,) 85; Barrett *v.* Wills, 4 Leigh, 117; Perth Amboy Co. *v.* Condit, 21 N. J. Law, 663; White *v.* Jordan, 27 Maine, 378; Forsyth *v.* Matthews, 14 Penn. St., 103; Burgess *v.* State, 12 G. & J., 64; Smith *v.* Mitchell, 6 Ga., 456; Knowlton *v.* Culver, 1 Chand., (Wis.,) 214, and reports *passim.*) No assignment of error can enlarge the bill of exceptions. (6 Ga., 457.) It is only *so much*

of the evidence as is necessary to understand the precise nature and effect of the ruling complained of that is to be inserted in the exceptions; and it is for the excepting party to see at his peril that so much does appear, or he will not establish the evidence of the grievance of which he complains. (Lincoln *v.* Claflin, 7 Wallace, 132; Laber *v.* Cooper, *id.*, 568; cases cited *supra* and authories *passim.*) "It is a perfectly well-settled rule of practice that no party can avail himself, upon the hearing of questions of law upon a bill of exceptions in this court, of any objection or cause of complaint which was not taken or stated at the time, or in the course of the trial, (citing cases.) It is right and proper that this should be so, for the very obvious reason that, if the objection had been taken, the opposite party would have had an opportunity to supply any defects in his *proof* or pleadings upon the points excepted to." (Jones *v.* Wolcott, 15 Gray, 542.)

But no defect can be supposed to exist in the cause at bar. The bond of the plaintiffs in error is no necessary part of the record. It is simply a piece of evidence, to be produced in support of the declaration, in case it exists within the jurisdiction of the court; or to be supplied by copy or parol evidence, if lost or destroyed; or by defendants' admission; but whether it be produced or its contents otherwise shown, it is merely a part of the evidence in the cause, and no part of the record. No objection being made on this score, it is alike the inference of law and of common sense that the bond or its legal equivalent was produced to the satisfaction of court, jury, and parties. Everything not excepted to is presumed to have been rightly done. As the court of Virginia said: "We may fairly infer from the absence of objection that acceptance was proved." (Colgin *v.* Henley, 6 Leigh, 104.)

Asking the pardon of the court for consuming two pages in noticing so untenable an objection, we proceed to the points that are specifically raised by the exceptions and urged in the brief.

II.

Counsel appears to waive the objection to the admission of the contract between the parties, which was claimed to be the *nudum pactum*, (Record, 11, folios 26, 27;) we will only add, therefore, to what we said upon this point in our former brief, filed a year ago, that this objection would have been more properly made, if it possessed any force, to the construction and effect of the instrument, rather than to its admissibility. The court could not consider or determine what its terms were until it was admitted. If claimed to be *nudum pactum*, the exception should have been to a refusal so to charge upon request, whereas no such request or refusal appears, but only a preliminary objection to its reception in evidence.

III.

The exclusion of the inquiry, proposed upon cross-examination, as to the names of those from whom the person furnishing supplies to the United States obtained such supplies, has also been sufficiently commented upon in my former brief. It will now only be added that the very reasons which counsel assigns in his argument (page 2, ¶ 2) for permitting the question to be asked show that the inquiry (at best) was only one which the court might, at its discretion, admit or reject in its proper supervision over the latitude to be allowed in cross-examination. Counsel now advocates its admis-

sion upon the ground that it was a "fishing" question, which, if in itself not pertinent or material, possibly might (or might not) have elicited something that might have led to something that would have been pertinent and material!

IV.

As to so much of the argument as applies to the right of the original defendants to have "the benefit of the books" of R. H. Bennett, it is enough to say that the books were not offered nor asked for; so the benefit of access to them was neither sought nor denied; but the witness said he could state a certain fact, if allowed to refresh his memory by recourse to his books; not to introduce the books themselves. The court ruled that the fact itself was not material or relevant, and accordingly there was no occasion to resort to the books.

V.

This brings us to the only point upon which we have ever supposed there could possibly be any difference of opinion between lawyers; and this, we conceive, was clearly decided correctly by the court.

That question is whether or not, after it is conceded that the quantities of supplies for which requisitions were issued by the quartermaster was authorized by law and Army and departmental regulations, and in compliance with the requisitions and estimates of post-quartermasters; and that the Government did pay for that quantity, and no more, upon the receipts and vouchers of the post-quartermasters, showing that the contractor has actually filled these requisitions; which receipts and vouchers were the documents usually acted upon in the

payment and settlement for supplies furnished under similar contracts to that declared upon, and in the ordinary course of business; can the person who has failed to perform his contract be permitted to introduce evidence of dealings between the party who undertook to supply the deficiency arising from this failure and those persons to whom rations were allowed by law, whereby the latter commuted these rations for money, and furnished the former with receipts and vouchers purporting to be for the supplies instead of for a money equivalent, by means of which vouchers and receipts the party holding them obtained full payment for all supplies required by the quartermaster in behalf of the United States? No statute or regulation is cited prohibiting such usage, nor do we find any; and inquiry at the War Department assures us there is none.

The defendants' counsel makes an erroneous assumption when he commences the second paragraph of section 4, upon page 3 of his brief, with the words, "If the grain was not *required by the Government*," &c. Here is the fallacy of their argument. "The Government," in making requisitions, acted only by its quartermaster and post-quartermasters. These functionaries did "require" the full amount supplied by Bennett, in consequence of the failure of Storm & Shrader to fulfill their contract, and the Government paid for that amount at the ordinary market-prices, upon production of the customary vouchers.

The purpose of the bond and contract were to indemnify and save harmless the United States from loss by reason of the failure of the contractors to furnish the required supplies. Having failed to keep their agreement, the contractors cannot throw any part of the loss upon the United States by contradicting the vouchers

upon which such contracts are always adjusted, re-opening a settlement between Bennett and the United States, and showing private transactions between Bennett and others tending to impeach those vouchers. The counsel says that, as to the forage commuted for, "the Government has sustained no loss." How this can be, we do not perceive. Whether the supplies themselves were delivered or their value, the United States had to pay the full market-price of the amount required; and its loss was, therefore, precisely the same in the one case as in the other.

Counsel, to strengthen his argument, introduces and italicizes the word, "*actually*" purchased in open market. The clause in question is that numbered *fifth* in the contract declared upon. (Record 3, folio 7.) "Fifth. That in case of failure or deficiency in the quantity or quality of the forage and straw herein contracted to be delivered, then the said Capt. William B. Hughes, assistant quartermaster, United States Army, or his successor, shall have *power* to supply the deficiency by purchase in open market, and the said Storm & Co. shall be required to pay the difference in cost, if any, in the gold coin of the United States, or its equivalent in legal-tender notes."

Several observations arise with relation to this provision, in connection with the question proposed and excluded.

1. *The contract itself*, though the declaration purports to recite it, as above quoted, from the record, *is not made a part of the bill of exceptions*, by reference or otherwise. The only reference to it is to its admission in evidence, and again incidentally upon the top of page 12. There is no evidence what contract was produced at the trial.

If the regularity of proceedings warrants the assumption that the instrument declared upon was then introduced, still (we repeat) *no instrument is brought before the court by the exceptions* to authorize or enable it to determine the pertinency and relevancy of the question asked and excluded to any issue in this case. There is absolutely nothing in the exceptions to justify asking the question. The contract was a part of the evidence, if used at all. The declaration was no part of the evidence. If the counsel desired to show any error in the admission or exclusion of testimony, the burden was upon him to *incorporate into his exceptions* enough of the evidence to have the error (if any there were) appear there. (Dunlop *v.* Munroe, 7 Cranch, 270, closing sentences of opinion.)

It is the function of bills of exception to bring into the record that which would otherwise not appear. (Young *v.* Martin, 8 Wallace, 357, and reports and authorities *passim*.) This contract was an instrument of evidence, to be so brought in, if it were thought desirable by the excepting party to have its tenor and contents examined and construed. Not being so brought into the record, it cannot be considered, and there is nothing to show the propriety of the question asked and excluded.

We should not have made this point, had not counsel sought to make one relative to the bond. But we do make and insist upon it now, and feel very sure that the court will declare it good.

We would again remind counsel that *the declaration upon the contract is not the contract*, but a very different thing.

2. The United States sue to recover damages for the defendants' breach of their contract. If proper for the court to refer to the declaration to determine the con-

tents of the contract itself, (which we deny,) then it will be found that this fifth item gives the Government "*power*" to supply the deficiency by purchase in open market, but does not peremptorily require the exercise of the power, nor make such purchase the only remedy for or criterion of damages. The damages were whatever the United States had to pay or suffer by reason of the defendants' failure to perform their contract. *One* way of determining this damage was by a purchase in open market; but it was not the only nor exclusive method. The United States might have found itself in such an exigency, by reason of defendants' fault, as to have been compelled to slaughter its cattle, &c.; or have been subjected to other loss by an inability to purchase seasonably or at all. In that case the defendants would nevertheless have been liable in damages for their breach of contract.

3. Again, say that the United States were "to purchase in open market" to supply any deficiency arising from the default of Storm & Shrader.

How was the quartermaster so to purchase? Naturally by procuring some other dealer to furnish the oats, &c., which these contractors had failed to supply, and "the difference in cost" between the contract-prices and those rates which ruled in the open market when the power "to supply the deficiency" was exercised "the said Storm & Co. shall be required to pay." It was "the deficiency" in quantity, short of what the contract called for, which was to be supplied; and the cost of supplying it at market-rates was the measure of damages. If the seller in open market, who agreed to fill this deficiency at current rates, produced the usual and

necessary vouchers to evidence his performance of this agreement, and was paid accordingly by the Government, the defaulting contractors cannot be heard to impeach this adjustment between him and the United States, since they only pay for their delinquency at the stipulated rate.

4. If this stipulation is regularly brought before this court so as to be considered by it, there is one further suggestion to be offered in regard to it; and that is the one only briefly hinted at in concluding my former brief, viz: That the language of the contract must be construed conformably to the usage or custom of that business with reference to which the plaintiffs in error must be presumed to have contracted.

"A general custom is a general law, and forms the law of a contract on the subject-matter. Though at variance with its terms, it enters into and controls its stipulations, as an act of Parliament or State legislature." (United States *v.* Arredondo, 6 Peters, 714; Van Ness *v.* Pacard, 2 Peters, 148.)

So the custom or usage of any particular locality or branch of business, or of any one person, firm, or corporation, will qualify and explain the purport of the express terms of any contract entered into in that locality, or relating to that business, or where the other party is advised of its existence by a course of dealing with the person, firm, or corporation. (Yeaton *v.* Bank, 5 Cranch, 52; Renner *v.* Bank, 9 Wheat., 583; Mills *v.* Bank, 11 Wheat., 483; Bank *v.* Triplett, 1 Peters, 34; Munn *v.* Burch, 25 Ill., 35.) This was the usage of this particular branch of business. (Bliven *v.* N. E. Screw Co., 23 Howard, 420, and 4 Blatchf., 98; Fox *v.* Parker, 44

Barb., 541; Dalton *v.* Daniels, 2 Hilton, 472; Stuart *v.* Beautty, 8 Mees. & Wels., 160.) The purpose is not to *change* the contract, but to show how the original party to it might have performed it agreeably to the intention of all concerned. The United States had the *power* to buy in open market. It also had power to supply the deficiency, as the original contractor could have done.

Again, it does not appear that there was any objection to proof of this usage. It is therefore admitted to exist. This being conceded, the question which was objected to and excluded, and is the foundation of these exceptions, becomes immaterial and irrelevant.

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